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**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DAVID GAMBINO,

Plaintiff,

v.

FEDERAL CORRECTIONAL  
INSTITUTION – MCKEAN, et al.,

Defendants.

Civil Action No. 1:14-cv-236 (BJR)

MEMORANDUM OPINION  
GRANTING PLAINTIFF’S MOTION  
FOR SUMMARY JUDGMENT.

Before the Court is the Report and Recommendation of Magistrate Judge Susan Paradise Baxter (Doc. No. 60), which recommends that Defendants’ Motion to Dismiss, or in the alternative, for Summary Judgment (Doc. No. 27) be denied as to Plaintiff’s retaliation claim against Defendants Kengersky, Troublefield, Siffrinn, and Van Horn, but granted in all other respects. After reviewing the Report and Recommendation, Plaintiff’s Objections, Defendants’ Objections, and the relevant filings, the Court declines to adopt the Report and Recommendation, and GRANTS Defendants’ Motion for failure to exhaust administrative remedies.

**A. Relevant Procedural History<sup>1</sup>**

On September 8, 2014, Plaintiff David A. Gambino, a prisoner formerly incarcerated at the Federal Correctional Institution at McKean in Bradford, Pennsylvania (“FCI-McKean”),<sup>2</sup> filed this *pro se* civil rights action pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Plaintiff subsequently filed an amended complaint on

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<sup>1</sup> These facts are adopted from the Report and Recommendation.

<sup>2</sup> Plaintiff is presently incarcerated at the Federal Correctional Institution at Cumberland, Maryland.

1 November 21, 2014, which superseded the original complaint and is the operative pleading in this  
2 case. (Doc. No. 16.) Named as Defendants in the amended complaint are the following alleged  
3 staff members at FCI-McKean: Warden Bobby Meeks, Warden; Assistant Warden “Hubbard”<sup>3</sup>;  
4 Clinical Director Dr. Michael Walt; Health Services Administrator Pieter Van Horn; Lieutenant  
5 Franklin Troublefield; Case Manager Keith Stauffer; Correctional Officer John Siffrinn; and five  
6 unidentified Defendants, named as “Medical Nurse,” “Medical Nurse 2,” “L.T.,” “Officer 1,” and  
7 “Officer 2.”<sup>4</sup>

8  
9 In his *pro se* amended complaint, Plaintiff lists multiple counts alleging that one or more  
10 of the Defendants violated his constitutional rights and caused him injury: (1) Defendants  
11 Troublefield, Van Horn, and Kengersky allegedly denied him emergency medical treatment from  
12 June 19, 2014 to June 24, 2014, which caused him to suffer injury on June 25, 2014 (Doc. No. 16  
13 at 3-8); (2) Defendant Kengersky allegedly denied him medical treatment on the morning of June  
14 25, 2014 (*id.* at 9-12); (3) Defendants Meeks, Walt, Van Horn, Kengersky, Stauffer, and Siffrinn  
15 allegedly failed to protect him from abuse and subjected him to unnecessary pain and suffering by  
16 disregarding his medical needs following his injury of June 25, 2014 (*id.* at 17-22); (4) Defendants  
17 Kengersky, Troublefield, Siffrinn, Van Horn, and Stauffer allegedly worked in concert to retaliate  
18 against him (*Id.* at 23-27); (5) since January 20, 2014, Defendant Stauffer has allegedly violated  
19 his First Amendment rights by reading his protected legal mail (*id.* at 28-30); (6) Defendants  
20 Troublefield and Siffrinn allegedly violated his rights under the Health Insurance Portability and  
21 Accountability Act of 1996, 42 U.S.C. § 1320d (“HIPAA”) by discussing his private medical  
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25 <sup>3</sup> In their Brief, Defendants have informed the Court that there was no individual named “Hubbard” who worked at FCI-McKean in 2014. Thus, Defendant “Hubbard” should be terminated from this case.

<sup>4</sup> None of the unidentified Defendants has since been identified or served in this case by Plaintiff, nor has an attorney entered an appearance on behalf of any of them. As a result, it will be recommended that these Defendants be dismissed from this action, and Plaintiff’s claims against these Defendants will not be considered here.

1 information over the phone with third parties without his consent. (*id.* at 31-33); (7) Defendants  
2 Meeks, Kengersky, Van Horn, Troublefield, Stauffer, and Siffrinn allegedly obstructed justice by  
3 failing to protect him as a witness to the purported wrongful death of a fellow inmate on July 25,  
4 2014 (*id.* at 34-37); and (8) Defendant Kengersky allegedly violated his Eighth Amendment rights  
5 by discontinuing his medications and medical aids from September 4, 2014 to October 20, 2014  
6 (*id.* at 38-40). Plaintiff seeks injunctive relief and monetary damages.

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8 On March 16, 2015, Defendants filed a motion to dismiss Plaintiff's amended complaint  
9 or, in the alternative, motion for summary judgment (Doc. No. 27), asserting that: (i) Plaintiff has  
10 failed to exhaust his administrative remedies with regard to his claims; (ii) Plaintiff cannot  
11 demonstrate that Defendants were deliberately indifferent to either his serious medical needs or  
12 his health and safety; (iii) Non-medical Defendants cannot be held liable for Plaintiff's medical  
13 claims; (iv) Plaintiff cannot establish a First Amendment retaliation claim; (v) Plaintiff cannot  
14 establish a claim of either denial of access to the courts or interference with legal mail; (vi) HIPAA  
15 does not create a private right of action; (vii) Plaintiff does not have a constitutional right to see  
16 another inmate's records; (viii) Defendants Meeks, Walt, Troublefield, and Stauffer should be  
17 dismissed from this case because Plaintiff has failed to allege their personal involvement in the  
18 alleged constitutional violations; (ix) Defendants are entitled to qualified immunity; (x) Defendant  
19 Van Horn is entitled to absolute immunity; and (xi) all unidentified Defendants should be  
20 dismissed. Plaintiff has since filed a brief in opposition to Defendants' motion. (Doc. No. 35.)  
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22 This matter is now ripe for consideration.  
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## B. Standards of Review

When deciding a motion to dismiss, a court generally should consider “only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.” *Lum v. Bank of America*, 361 F.3d 217, 222 (3d Cir. 2004). If a court considers other matters, a motion to dismiss should be converted to a motion for summary judgment. *See Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1197 (3d Cir. 1993). If a motion to dismiss or a motion for judgment on the pleadings is converted into a summary judgment motion, the court must provide notice and an opportunity to oppose the motion. *See Hancock Industries v. Schaeffer*, 811 F.2d 225, 229 (3d Cir. 1987). The Court treats Defendants’ Motion as one for summary judgment because Defendants label it as such and rely on evidence outside of the complaint. Plaintiff was on notice that Defendants were moving for summary judgment, and he had the opportunity to respond and to submit additional evidence of his own. (Doc. No. 35.)

Federal Rule of Civil Procedure 56(a) provides that summary judgment shall be granted if the “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Under Rule 56, the district court must enter summary judgment against a party “who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment may be granted when no “reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together

1 with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material  
2 fact.” *Celotex*, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56).

3 The moving party has the initial burden of proving to the district court the absence of  
4 evidence supporting the non-moving party’s claims. *Celotex*, 477 U.S. at 330; *see also Andreoli*  
5 *v. Gates*, 482 F.3d 641, 647 (3d Cir. 2007); *UPMC Health System v. Metropolitan Life Ins. Co.*,  
6 391 F.3d 497, 502 (3d Cir. 2004). When a non-moving party would have the burden of proof at  
7 trial, the moving party has no burden to negate the opponent’s claim. *Celotex*, 477 U.S. at 323.  
8 The moving party need not produce any evidence showing the absence of a genuine issue of  
9 material fact. *Id.* at 325. “Instead, . . . the burden on the moving party may be discharged by  
10 ‘showing’ – that is, pointing out to the district court – that there is an absence of evidence to support  
11 the nonmoving party’s case.” *Id.* at 324. “Rule 56(e) permits a proper summary judgment motion  
12 to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere  
13 pleadings themselves.” *Id.*

14  
15 *Pro se* pleadings, “however inartfully pleaded,” must be held to “less stringent standards  
16 than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520 (1972). If the  
17 court can reasonably read pleadings to state a valid claim on which the litigant could prevail, it  
18 should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax  
19 and sentence construction, or litigant’s unfamiliarity with pleading requirements. *Boag v.*  
20 *MacDougall*, 454 U.S. 364 (1982); *United States ex rel. Montgomery v. Brierley*, 414 F.2d 552,  
21 555 (3d Cir. 1969) (A petition prepared by a prisoner may be inartfully drawn and should be read  
22 “with a measure of tolerance”); *Freeman v. Department of Corrections*, 949 F.2d 360 (10th Cir.  
23 1991). Under our liberal pleading rules, a district court should construe all allegations in a  
24 complaint in favor of the complainant. *Gibbs v. Roman*, 116 F.3d 83 (3d Cir.1997) (overruled on  
25

1 other grounds); *see, e.g., Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996) (discussing Fed. R. Civ.  
2 P. 12(b)(6) standard); *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990) (same).  
3 Because Plaintiff is a *pro se* litigant, this Court will consider facts and make inferences where it is  
4 appropriate.

### 5 **C. Exhaustion of Administrative Remedies**

6 Defendants contend that Plaintiff's complaint should be dismissed for failure to comply  
7 with the exhaustion requirements of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a)  
8 ("PLRA"), which provides: "no action shall be brought with respect to prison conditions under  
9 section 1983 of this title . . . by a prisoner confined in any jail, prisons, or other correctional facility  
10 until such administrative remedies as are available are exhausted." *Id.*<sup>5</sup>

#### 12 **1. Exhaustion Standard**

13 The requirement that an inmate exhaust administrative remedies applies to all inmate suits  
14 regarding prison life, including those that involve general circumstances as well as particular  
15 episodes. *Porter v. Nussle*, 534 U.S. 516 (2002); *Concepcion v. Morton*, 306 F.3d 1347 (3d Cir.  
16 2002) (for history of exhaustion requirement). Administrative exhaustion must be completed prior  
17 to the filing of an action. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). Federal courts are  
18 barred from hearing a claim if a plaintiff has failed to exhaust all the available remedies. *Grimsley*  
19 *v. Rodriguez*, 113 F.3d 1246 (Table), 1997 WL 2356136 (unpublished opinion) (10th Cir. May 8,  
20 1997).<sup>6</sup> The exhaustion requirement is not a technicality, rather it is federal law which federal  
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24 <sup>5</sup> It is not a plaintiff's burden to affirmatively plead exhaustion. *Jones v. Bock*, 549 U.S. 199, 217 (2007) ("failure to  
25 exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate  
exhaustion in their complaints."). Instead, the failure to exhaust must be asserted and proven by the defendants. *Ray*  
*v. Kertes*, 285 F.3d 287, 295 (3d Cir. 2002).

<sup>6</sup> A plaintiff's failure to exhaust his administrative remedies does not deprive the district court of subject matter  
jurisdiction. *Nyhuis v. Reno*, 204 F.3d 65, 69 n.4 (3d Cir. 2000) ("[W]e agree with the clear majority of courts that

1 district courts are required to follow. *Nyhuis v. Reno*, 204 F.3d 65, 73 (3d Cir. 2000) (by using  
2 language “no action shall be brought,” Congress has “clearly required exhaustion”).<sup>7</sup> The PLRA  
3 also requires “proper exhaustion” meaning that a prisoner must complete the administrative review  
4 process in accordance with the applicable procedural rules of that grievance system. *Woodford v.*  
5 *Ngo*, 548 U.S. 81, 87-91 (2006) (“Proper exhaustion demands compliance with an agency’s  
6 deadlines and other critical procedural rules.”). Importantly, the exhaustion requirement may not  
7 be satisfied “by filing an untimely or otherwise procedurally defective . . . appeal.” *Id.* at 83; *see*  
8 *also Spruill v. Gillis*, 372 F.3d 218, 228-29 (3d Cir. 2004) (“Based on our earlier discussion of the  
9 PLRA’s legislative history, [ . . . ] Congress seems to have had three interrelated objectives relevant  
10 to our inquiry here: (1) to return control of the inmate grievance process to prison administrators;  
11 (2) to encourage development of an administrative record, and perhaps settlements, within the  
12 inmate grievance process; and (3) to reduce the burden on the federal courts by erecting barriers  
13 to frivolous prisoner lawsuits.”).

## 14 15 **2. The Administrative Process Available to Federal Inmates**

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17 So then, no analysis of exhaustion may be made absent an understanding of the  
18 administrative process available to prison inmates. “Compliance with prison grievance  
19 procedures, therefore, is all that is required by the PLRA to ‘properly exhaust.’ The level of detail  
20 necessary in a grievance to comply with the grievance procedures will vary from system to system  
21 and claim to claim, but it is the prison’s requirements, and not the PLRA, that define the boundaries  
22 of proper exhaustion.” *Jones v. Bock*, 107 U.S. at 217.

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25 § 1997e(a) is *not* a jurisdictional requirement, such that failure to comply with the section would deprive federal courts of subject matter jurisdiction.”).

<sup>7</sup> There is no “futility” exception to the administrative exhaustion requirement. *Banks v. Roberts*, 2007 WL 3096585, at \*1 (3d Cir.) (citing *Nyhuis*, 204 F.3d at 71 (“[Plaintiff’s] argument fails under this Court’s bright line rule that ‘completely precludes a futility exception to the PLRA’s mandatory exhaustion requirement.’”)).

1 The Bureau of Prisons has established a multi-tier system whereby a federal prisoner may  
2 seek formal review of any aspect of his imprisonment. 28 C.F.R. §§ 542.10-542.19 (1997). First,  
3 “an inmate shall . . . present an issue of concern informally to staff, and staff shall attempt to  
4 informally resolve the issue before an inmate submits a Request for Administrative Remedy.” 28  
5 C.F.R. § 542.13(a). Second, if an inmate at an institution is unable to informally resolve his  
6 complaint, he may file “a formal written Administrative Remedy Request, on the appropriate form  
7 (BP-9), [within] 20 calendar days following the date on which the basis for the Request occurred.”  
8 28 C.F.R. § 542.14(a). The warden has twenty (20) days in which to respond. 28 C.F.R. § 542.18.  
9 An inmate who is not satisfied with the warden’s response may submit an appeal, on the  
10 appropriate form (BP-10), to the appropriate Regional Director within twenty (20) calendar days  
11 from the date the warden signed the response. 28 C.F.R. § 542.15(a). The Regional Director has  
12 thirty (30) days to respond. 28 C.F.R. § 542.18. An inmate who is not satisfied with the Regional  
13 Director’s response may submit an appeal, on the appropriate form (BP-11), to the General  
14 Counsel within thirty (30) calendar days from the date the Regional Director signed the response.  
15 *Id.* The General Counsel has forty (40) days to respond. 28 C.F.R. § 542.18.

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18 “If the inmate does not receive a response within the time allotted for reply, including  
19 extension, the inmate may consider the absence of a response to be a denial at that level.” 28  
20 C.F.R. § 542.18. Regulations also provide procedures for when an inmate fears that the filing of  
21 his grievance will jeopardize his well-being:

22 (d) Exceptions to initial filing at institution—  
23

24 (1) Sensitive issues. If the inmate reasonably believes the issue is sensitive and the  
25 inmate's safety or well-being would be placed in danger if the Request became  
known at the institution, the inmate may submit the Request directly to the  
appropriate Regional Director. The inmate shall clearly mark “Sensitive” upon the  
Request and explain, in writing, the reason for not submitting the Request at the  
institution. If the Regional Administrative Remedy Coordinator agrees that the

1 Request is sensitive, the Request shall be accepted. Otherwise, the Request will not  
2 be accepted, and the inmate shall be advised in writing of that determination,  
3 without a return of the Request. The inmate may pursue the matter by submitting  
an Administrative Remedy Request locally to the Warden. The Warden shall allow  
a reasonable extension of time for such a resubmission.

4 28 C.F.R. § 542.14(d)(1).

### 5 **3. Analysis**

6 In support of their contention that Plaintiff failed to exhaust his administrative remedies,  
7 Defendants have submitted the Declaration of Kimberly Sutton, a Paralegal Specialist with the  
8 Federal Bureau of Prisons' Northeast Regional Office, who declares, in pertinent part:  
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10 5. A review of Sentry [the BOP's computerized database] shows that [Plaintiff] has  
11 not exhausted his available administrative remedies for any of the allegations  
[Plaintiff] raised in his Amended Complaint.

12 6. [Plaintiff] filed a Request for Administrative Remedy (No. 792502-F1) at FCI  
13 McKean on September 3, 2014, concerning a medical visit and perceived  
14 harassment. That request was rejected that same date because [Plaintiff] failed to  
ask for a remedy. [Plaintiff] did not re-file his Request for Administrative Remedy  
concerning this issue again. . . .

15 7. [Plaintiff] filed a Request for Administrative Remedy (No. 792505-F1) at FCI  
16 McKean on September 3, 2014, concerning his perceived harassment by staff. That  
17 request was rejected that same date because Plaintiff again failed to ask for a  
remedy and attached too many continuation pages. [Plaintiff] did not re-file his  
18 Request for Administrative Remedy concerning this issue again. . . .

19 8. [Plaintiff] filed no other Request for Administrative Remedy concerning any  
20 other issue.

21 (Doc. No. 28-1 ¶¶ 5-8).

22 In response, Plaintiff alleges that Defendants denied him access to the grievance process  
23 by refusing to correctly process his grievances, making retaliatory threats, and issuing false  
24 misconducts against him. (Doc. No. 35 at 13). In particular, Plaintiff contends that Defendants  
25 Stauffer and Siffrinn delayed the filing of his administrative remedy requests for up to four months  
(*id.* at 24 ¶ 6); Defendant Troublefield threatened to return him to the Special Housing Unit and to

1 label him as a sexual predator if he continued to complain of staff harassment and abuse (*id.* at 21  
2 ¶¶ 1, 2); and Defendants worked in concert to take away his privileges through the issuance of  
3 false misconducts, which allegedly hindered his ability to access the grievance system (*id.* at 22-  
4 23, ¶¶ 3-5). In addition, Plaintiff has submitted a number of exhibits that appear to partially support  
5 these allegations. (Docs. No. 35-3 and 35-4.)<sup>8</sup>

6         The Report and Recommendation proposes that Plaintiff's claims should not be dismissed  
7 based upon Plaintiff's failure to comply with the PLRA's exhaustion requirements because his  
8 allegations and supporting documents "raise a genuine issue of material fact as to whether the  
9 administrative remedy process was indeed made available to Plaintiff." (Doc. No. 60 at 12.)  
10 However, the Report and Recommendation does not reckon with 28 C.F.R. § 542.18, which  
11 provides procedures for exhausting a claim that is not timely responded to by the government, or  
12 § 542.14(d)(1), which provides procedures for exhausting a claim when the inmate fears the filing  
13 of a grievance will jeopardize his well-being. Specifically, the delay Plaintiff suffered while  
14 waiting for a response to his grievance did not excuse him from the requirement that he first seek  
15 an administrative remedy; it permitted him to consider that delay a denial and appeal to the next  
16 level. 28 C.F.R. § 542.18. In other words, when the government does not respond to a prisoner's  
17 grievance within the required timeline, the inmate may either continue waiting for a response or  
18 appeal to a higher level of review. The exhaustion procedures do not permit Plaintiff to abort the  
19 administrative process and file his grievance in federal court.

22         Similarly, Plaintiff was not excused from the PLRA's exhaustion requirement when  
23 Defendants threatened to retaliate if he filed a grievance. The Third Circuit has recognized that in  
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<sup>8</sup> These exhibits contain copies of two administrative remedy requests that were filed by Plaintiff on June 30, 2014, but were not responded to until August 28, 2014, and a third administrative remedy request that was filed by Plaintiff on September 24, 2014, but was not responded to until January 27, 2015.

1 such instances, a plaintiff must exhaust by filing his complaint directly with the Regional Director  
2 under 28 C.F.R. § 542.14(d)(1), or otherwise allege that Defendants prevented him from pursuing  
3 this alternative procedure for exhaustion. *See Davis v. Saylor*, No. 14-2693, 2015 WL 6735904,  
4 at \*3 (3d Cir. Nov. 4, 2015). In *Davis*, the plaintiff argued that exhaustion was not required  
5 because he brought claims for retaliation and feared reprisals from prison staff for filing a  
6 grievance. *Id.* at \*2. The Third Circuit held otherwise:

7       Davis concedes that the BOP has an established Administrative Remedy Program,  
8 but argues that it was effectively unavailable to him because he had been threatened  
9 by Officer Brininger with further retaliation if he ‘file[d] anything.’ While we have  
10 recognized that a prisoner’s failure to exhaust may be excused when the actions of  
11 prison staff render the administrative remedies ‘unavailable,’ we cannot say that  
12 there were no remedies available to Davis here. Even assuming that Officer  
13 Brininger’s threats deterred Davis from lodging an informal complaint with prison  
14 staff under 28 C.F.R. § 542.13, or from filing a formal request with the correctional  
15 counselor under 28 C.F.R. § 542.14(c), Davis could have bypassed the institution  
and filed a complaint directly with the Regional Director under 28 C.F.R.  
§ 542.14(d)(1), if he believed that his safety or well-being was in danger. Given  
that Davis did not provide any argument or evidence in the District Court  
suggesting that this alternative procedure was unavailable to him, the District Court  
properly entered summary judgment against him.

16 *Id.* at \*3. Because Plaintiff has likewise failed to provide any argument or evidence suggesting  
17 that the procedures outlined in 28 C.F.R. § 542.14(d)(1) were unavailable to him, summary  
18 judgment is also properly entered against him.

19       The Report and Recommendation cites three cases in support of the proposition that  
20 exhaustion is not required when the administrative remedy process is unavailable. (Doc. No. 60  
21 at 11-12.) These cases are distinguishable. In *Mitchell v. Horn*, 318 F.3d 523, 529 (3d Cir. 2003),  
22 the Third Circuit held that the prisoner was excused from exhaustion requirements because prison  
23 officials refused to provide the prisoner with the necessary grievance forms. In *Berry v. Klem*, 283  
24 Fed. App’x 1, 4-5 (3d Cir. March 20, 2009), the Court noted in passing that threats of retaliation  
25 “put in question the availability of the remedy,” but held, “we express no opinion on whether

1 [Plaintiff] has exhausted his administrative remedies” because it concluded the district court erred  
2 in converting Defendants’ motion to dismiss into a motion for summary judgment without  
3 providing Plaintiff with appropriate notice and an opportunity to respond. And in *McKinney v.*  
4 *Guthrie*, 309 Fed. App’x 586, 589 (3d Cir. 2009), the Court remanded because it was unclear why  
5 the district court *sua sponte* reversed its prior denial of summary judgment and determined that  
6 administrative remedies had not been exhausted. None of these cases holds that threats of  
7 retaliation excuse an inmate from complying with the remedy supplied by 28 C.F.R. § 542.14(d)(1)  
8 specifically or the PLRA’s exhaustion requirements generally.  
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10 Because Plaintiff’s failure to exhaust disposes of this case, it is unnecessary to reach the  
11 merits of any of the nine claims adjudicated by the Magistrate Judge. For the foregoing reasons,  
12 the Court hereby GRANTS Defendants’ Motion for Summary Judgment (Doc. No. 27). Because  
13 Plaintiff’s Motion for Relief from Judgment of Denied Claims (Doc. No. 92) does not cure or  
14 otherwise address his failure to exhaust, the Motion is DENIED. The Clerk shall send copies of  
15 this Order to the parties. CASE DISMISSED.  
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17 Dated this 31st day of March, 2017.

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21 Barbara Jacobs Rothstein  
22 U.S. District Court Judge  
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